

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN D. BROOKS

Claimant

VS.

**K.C. FLATWORK CONCRETE, INC.,
n/k/a AMERICAN CONCRETE
FLATWORK, INC.**

Respondent

Docket No. 1,034,525

AND

**AMERISURE MUTUAL INS. CO.;
HAWKEYE SECURITY INS. CO.; and
CONTINENTAL WESTERN INS. CO.**

Insurance Carriers

ORDER

STATEMENT OF THE CASE

Respondent and one of its insurance carriers, Continental Western Insurance Company (Continental Western) requested review of the August 24, 2007, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler. James E. Martin, of Overland Park, Kansas, appeared for claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent and its insurance carrier, Continental Western. Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent and its insurance carrier, Amerisure Insurance Company (Amerisure). J. Stephanie Warmund, of Overland Park, Kansas, appeared for respondent and its insurance carrier, Hawkeye Security Insurance Company (Hawkeye).¹

¹ The briefs of counsel for Continental and Amerisure indicate that K.C. Flatwork Concrete, Inc., and American Concrete Flatwork, Inc., are separate entities. However, counsel for the other parties describe the transaction as a name change. As the trial of this matter proceeds, the record needs to be clarified in this regard.

The Administrative Law Judge (ALJ) ordered respondent and Continental Western to pay claimant temporary total disability compensation at the rate of \$483 from June 6, 2007, to be continued during his current disability from his latest surgery or until further ordered. The ALJ said he was keeping all other issues under consideration for further evidence.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 23, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent and Continental Western contend that claimant did not suffer an accidental injury arising out of and in the course of his employment with respondent on April 26, 2007. Respondent and Continental Western contend that claimant's alleged April 26, 2007, injury resulted from an activity of daily living and is not compensable pursuant to K.S.A. 2006 Supp. 44-508(e). In the event the Board finds that claimant's alleged injury of April 26, 2007, was not the result of an activity of daily living, it should find that claimant's disability and need for medical treatment are the result of previous injuries sustained by claimant. Accordingly, respondent and Continental Western request that the Board reverse the ALJ's Preliminary Decision wherein he ordered them to pay temporary total disability benefits to claimant.

Respondent and Amerisure agree with the ALJ's finding that respondent/Continental Western are responsible for payment of temporary total disability compensation to claimant for an accident that occurred on April 26, 2007, and request the Preliminary Decision of the ALJ be affirmed. Respondent and Amerisure further contend that claimant did not give written claim to respondent of an accident on October 6, 2004, and, therefore, claimant is time barred from now maintaining a claim for an accident of October 6, 2004.

Respondent and Hawkeye contend that claimant suffered an accident on April 26, 2007, and that he was not engaged in a personal task. Respondent and Hawkeye further assert that although claimant had preexisting back problems, those resulted from work-related accidents. In the event the Board does not find that claimant sustained separate injuries but rules that he suffered a series of injuries, his date of accident would be his last day worked, April 27, 2007. Respondent and Hawkeye argue that regardless of which theory determines claimant's date of accident, there is no evidence to support any injuries or accidents during the period of time Hawkeye provided respondent with workers compensation coverage.

Claimant contends he sustained his burden of proving that he met with personal injury by accident as a result of an accident or a series of accidents, or both, that arose out of and in the course of his employment with respondent. Claimant argues, however, that the ALJ erred in commencing payment of temporary total disability compensation on

June 16, 2007, since the parties stipulated that claimant was temporarily totally disabled from April 28, 2007. Claimant further argues the ALJ erred in failing to order payment of claimant's past and present medical bills and to reimburse claimant \$250 in unauthorized medical expenses.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over any or all of the issues raised in this appeal?

(2) Is claimant's need for preliminary benefits, specifically temporary total disability compensation, the result of a personal injury by accident on April 26, 2007, that arose out of and in the course of his employment with respondent?

(3) Did claimant sustain two or more separate and distinct accidental injuries or a series of accidental injuries to his last day worked, that arose out of and in the course of his employment with respondent?

(4) Did claimant give respondent timely written claim of his alleged accident of October 6, 2004?

(5) Is claimant entitled to payment of temporary total disability compensation from April 28, 2007, rather than June 6, 2007?

(6) Is claimant entitled to payment of his past, present and future medical bills and payment of \$250 in unauthorized medical expenses?

FINDINGS OF FACT

On May 4, 2007, claimant filed his Application for Hearing claiming a series of accidents from "[o]n or about October 6, 2004 and each and every day worked to April 26, 2007" while "[p]erforming regular duties of his job which included running a Georgia buggy [and] doing concrete finishing work," injuring his low back.² During the period covering October 6, 2004, to April 26, 2007, respondent had workers compensation coverage from three insurance carriers, Amerisure, Hawkeye, and Continental Western. Amerisure had coverage from June 1, 2003, to November 23, 2004; there was a break in coverage and then Hawkeye had coverage from April 8, 2005, to November 1, 2006; and Continental Western had coverage from November 1, 2006, onward.³

² Form K.-WC E-1, Application for Hearing, filed May 4, 2007.

³ It does not appear that respondent has separate counsel representing it for the period when it was uninsured.

A preliminary hearing was held August 23, 2007, in which claimant was asking for payment of his medical bills and payment of temporary total disability compensation. The parties agreed that claimant was temporarily totally disabled April 28, 2007, and continuing. There was disagreement as to which insurance carrier would be responsible for payment of any medical benefits or temporary total benefits due to claimant.

Claimant worked for respondent, a concrete construction company, supervising workers, performing manual labor forming concrete, driving and dumping concrete trucks, and performing layout work. On October 6, 2004, claimant was pouring and finishing concrete. He was stretched in an awkward position on a slope. He strained something and felt pain in his back. He notified respondent of his injury and several times asked for workers compensation forms. For some reason, they were not made available to him. Respondent did not send him for a medical evaluation or medical treatment, and ultimately, in early 2005, claimant went to Truman Medical Center (Truman) on his own. He was sent to physical therapy for approximately four to six weeks and took over-the-counter pain medication. He felt better after this therapy and the problems in his legs receded. He was able to return to work when the crews were called back in the spring of 2005. He worked the rest of the year. He did not need any more medical care during that time. He was laid off again at the end of 2005 and early 2006.

In the fall of 2006, claimant was moving a Georgia buggy from one area to another. He pulled out into the street and was forced to turn the Georgia buggy to avoid a vehicle. The equipment began to go in a circle. The platform hit claimant in the middle of his back and threw him onto the ground, running over his ankle. He felt pain down the bottom middle of his back at his belt line. He called respondent's office and reported the injury to Ron Lewis, an estimator at respondent. He also reported the injury to Dennis Gander, a superintendent on the job. Although he did not physically work the rest of the day, he stayed on the job site. Within a couple of days, he had reported the injury to both of the owners of respondent. Respondent did not send him for medical care. Claimant testified he started getting worse and at times used a cane after that incident.

Claimant cannot remember what day this injury occurred, only knowing it occurred in fall 2006. The general contractor on the job, James McAnelli of SM Wilson, however, told him that the injury occurred the week of November 20, 2006, which would have been Thanksgiving week. Claimant said he completed a daily sheet on the day the accident happened and indicated on that sheet that the incident had occurred. Daily sheets dated November 1, November 2, November 9, November 17 and November 20 were introduced as evidence, none of which contained an indication of an accident occurring on any of those dates. Claimant did not know if those dailies were complete, even for the days he was given. Claimant admitted that he could not say for certain when the 2006 incident occurred but does not think it occurred before November 1, 2006.

Claimant continued to go to work after the incident, although at times he had difficulty performing his job duties. When claimant was in his seasonal layoff the end of

2006 and first of 2007, he, on his own, sought medical treatment for his back at Truman. Respondent had not sent him for medical treatment. Claimant did not tell respondent he needed to see a doctor.

On April 26, 2007, claimant was working for respondent at the Kansas City, Missouri, zoo. He had gotten down on his knees to show the concrete finishers what he wanted them to do. When he tried to stand back up, his legs went out from under him. He was having pain in the middle of his back going down his legs. Two coworkers helped him up and assisted him to his truck. He stayed in his truck most of the rest of the day. The next morning, April 27, 2007, he got up from bed and fell down. He managed to get himself up. He believed he needed to go to work, so he used two canes to get around. His crew was shorthanded that day, so he had to run the Georgia buggy again. When he was getting ready to park the Georgia buggy, it hit a bump and jerked to a stop. Claimant stumbled off the platform, holding on to the edge to keep from falling. He had lost control of his bladder and needed to be helped to his truck. He notified Mr. Lewis of his accident. The next week was a rain out week, and he spoke with his bosses about his condition. He was not sent anywhere for medical treatment by respondent until he was evaluated on August 8, 2007, by Dr. Vito Carabetta. Instead, claimant returned to Truman for treatment.

Claimant's personal physician at Truman had scheduled him for an MRI earlier in March 2007 and had then scheduled claimant to see Dr. Gianino, a neurosurgeon at Truman before the incident of April 26. After April 26, claimant had pain in his back and down his legs. He could only walk from 5 to 10 feet without help and had to use a wheelchair. Claimant saw Dr. Gianino throughout the summer of 2007, and ultimately had surgery on August 13, 2007, at Truman. Since his surgery, he does not have as much pain down his legs. He still uses a wheelchair and at times a walker. He still cannot drive.

Claimant has coverage through Medicaid, who paid most of his medical bills at Truman. Claimant paid the rest of the medical bills himself.

Claimant had never given respondent notice in writing that he had injured himself at work before April 27, 2007, unless it had been noted on a daily. He should have written up the incidents on the respective dailies but could not recall whether he had.

Dr. Michael Poppa saw claimant on May 8, 2007, at the request of claimant's attorney. Dr. Poppa stated that claimant had not reached maximum medical improvement regarding his work-related injuries that occurred on or about October 6, 2004, and each and every day worked to April 26, 2007, and on April 26, 2007. He also opined that claimant's employment and work-related duties at respondent were the direct, proximate and prevailing factor in his resulting medical conditions and disability.

Dr. Carabetta saw claimant at the request of respondent and Continental Western on August 8, 2007, and opined that claimant's back problems did not appear to be a progression of preexisting problems but appear to have been "abruptly worsened in the

[f]all of 2006. . . . The need for this medical treatment [surgery scheduled for August 13, 2007] appears to be causally related not to more recent events of April of 2007, but rather to the specific fall he had in late 2006[.] [T]his seems to have expedited the worsening of his condition.”⁴

PRINCIPLES OF LAW

The Board’s jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁵ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

⁴ P.H. Trans., Resp. Ex. A at 4.

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

In *Tull*,⁶ the Kansas Court of Appeals stated:

Disputes between contending insurance carriers concerning their respective liabilities for the payment of workers compensation awarded to an injured worker employed by their insured should not generally be litigated in the compensation proceedings, but in separate proceedings between the carriers brought for such purpose.

Date of accident for purposes of determining the respective liability of successive insurance carriers is not a jurisdictional issue on an appeal from a preliminary hearing order.⁷

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁸

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) states: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁰

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

⁶ *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, Syl. ¶ 1, 150 P.3d 316 (2007).

⁷ See, e.g., *Richard v. Reddi Services*, No. 1,003,482, 2004 WL 1810314 (WCAB July 20, 2004).

⁸ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁹ K.S.A. 2006 Supp. 44-501(a).

¹⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.¹¹

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹² The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹³

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-557(c) states:

No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date

¹¹ *Id.* at 278.

¹² *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971); *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

¹³ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁴ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁵

ANALYSIS

The ALJ determined claimant was temporarily and totally disabled, and therefore entitled to temporary total disability compensation, as a direct result of the April 26, 2007, accidental injury that occurred while claimant was working for respondent. The ALJ described this as claimant's last injury alleged, but claimant actually returned to work the next day and suffered another accidental injury. Although claimant had suffered previous accidents and back injuries while working for respondent and was receiving medical treatment for those injuries, his last accidents on April 26, 2007, and April 27, 2007, aggravated his preexisting condition. Dr. Poppa attributes claimant's condition to a series of work accidents, including the several specific incidents. Dr. Carabetta, however, points primarily to the accident that occurred in the fall of 2006 and suggests that claimant would have had to undergo the surgery of August 13, 2007, regardless of the subsequent accidents and aggravations. Claimant describes two specific incidents occurring at work on April 26, 2007, and April 27, 2007, which resulted in significantly increased symptoms, including pain down his legs to an extent he had not experienced before and loss of bladder control. These accidents aggravated his preexisting condition and accelerated his need for surgery. The Board does not have jurisdiction to review the ALJ's determination that claimant is temporarily and totally disabled or the date from which the temporary total disability compensation should commence. But the Board may review whether the temporary total disability is attributable to a work related accident and injury because that gives rise to a disputed issue of whether the benefits are for an accidental injury that arose out of and in the course of claimant's employment with respondent.

Respondent does not dispute having received timely notice and timely written claim for claimant's April 26, 2007, and April 27, 2007, accidents. Therefore, notice and written claim are not issues for this appeal.

¹⁴ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁵ K.S.A. 2006 Supp. 44-555c(k).

The ALJ did not reach the issue of whether claimant suffered prior accidents and injuries, and neither does the Board. First, the Board generally does not consider issues not decided by the ALJ. Second, it is not necessary to decide those issues for purposes of this appeal.

CONCLUSION

Claimant suffered personal injuries by accidents on April 26, 2007, and April 27, 2007, that arose out of and in the course of his employment with respondent. Claimant's alleged temporary total disability is directly attributable to those accidents. The Board is either without jurisdiction at this stage of the proceedings to address the other issues raised by the parties or they have been rendered moot by the above findings and conclusions.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Robert H. Foerschler dated August 24, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and Continental Western Insurance Company
Michelle Daum Haskins, Attorney for Respondent and Hawkeye Security Insurance Company
J. Stephanie Warmund, Attorney for Respondent and Amerisure Mutual Insurance Company
Robert H. Foerschler, Administrative Law Judge